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CLERK U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SAMUEL K. PORTER,

Petitioner,

v.

L.S. MCEWEN, Warden

Respondent.

Civil No. 11-1621 WQH (NLS)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

**FAILURE TO SATISFY THE FILING FEE REQUIREMENT**

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254.

**FAILURE TO STATE A COGNIZABLE CLAIM ON HABEAS CORPUS**

Further, upon review of the Petition, it appears to the Court that a Petition for Writ of Habeas Corpus brought pursuant to § 2254 is not the proper vehicle for the claims Petitioner presents. Petitioner lists various problems he claims he is facing in prison. Specifically, Petitioner claims: is he is being subject to "torturous conditions" in prison, in violation of the Eighth Amendment. (See Pet. at 4.) He also alleges he has been assaulted in prison and that

1 prison officials did nothing to prevent the assaults. (*See id.*) Further, he appears to claim that  
 2 he has a “tape worm” and has not received proper medical treatment for his condition. (*See Pet.*  
 3 at 6.) Petitioner’s claims are not cognizable on habeas because they not challenge the  
 4 constitutional validity or duration of confinement. *See* 28 U.S.C. § 2254(a); *Preiser v.*  
 5 *Rodriguez*, 411 U.S. 475, 500 (1973); *Heck v. Humphrey*, 512 U.S. 477, 480-85 (1994).  
 6 “Section 2254 applies only to collateral attacks on state court judgments.” *McGuire v. Blubaum*,  
 7 376 F. Supp. 284, 285 (D. Ariz. 1974).

8 In no way does Petitioner claim his state court conviction violates the Constitution or laws  
 9 or treaties of the United States. Rule 4 of the Rules Governing Section 2254 Cases provides for  
 10 summary dismissal of a habeas petition “[i]f it plainly appears from the face of the petition and  
 11 any exhibits annexed to it that the petitioner is not entitled to relief in the district court.” Rule 4,  
 12 28 U.S.C. foll. § 2254. Here, it is plain from the petition that Petitioner is not presently entitled  
 13 to federal habeas relief because he has not alleged that the state court violated his federal rights.

14 Challenges to the fact or duration of confinement are brought by petition for a writ of  
 15 habeas corpus, pursuant to 28 U.S.C. § 2254; challenges to conditions of confinement are  
 16 brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. *See Preiser*, 411 U.S. at 488-500.  
 17 When a state prisoner is challenging the very fact or duration of his physical imprisonment, and  
 18 the relief he seeks is a determination that he is entitled to immediate release or a speedier release  
 19 from that imprisonment, his sole federal remedy is a writ of habeas corpus. *Id.* at 500. On the  
 20 other hand, a § 1983 action is a proper remedy for a state prisoner who is making a constitutional  
 21 challenge to the conditions of his prison life, but not to the fact or length of his custody. *Id.* at  
 22 499; *McIntosh v. United States Parole Comm’n*, 115 F.3d 809, 811-12 (10th Cir. 1997). It  
 23 appears that Petitioner challenges the conditions of his prison life, but not the fact or length of  
 24 his custody.<sup>1</sup> Thus, Petitioner has not stated a cognizable habeas claim pursuant to § 2254.

#### 25 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

26 Further, habeas petitioners who wish to challenge either their state court conviction or the  
 27 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.

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<sup>1</sup> Petitioner already has a § 1983 complaint pending in this court in *Porter v. Howard*, 10cv1817 JLS (PCL).

§ 2254(b), (c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28 U.S.C. § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court remedies a petitioner must allege, in state court, how one or more of his or her federal rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995) reasoned: “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For example, “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only in federal court, but in state court.” *Id.* at 366 (emphasis added).

Nowhere on the Petition does Petitioner allege that he raised his claims in the California Supreme Court. If Petitioner has raised his claims in the California Supreme Court he must so specify. “The burden of proving that a claim has been exhausted lies with the petitioner.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); *see Breard v. Pruett*, 134 F.3d 615, 619 (4th Cir. 1998); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997); *Oyler v. Allenbrand*, 23 F.3d 292, 300 (10th Cir. 1994); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively

1 applicable to cases on collateral review; or

2 (D) the date on which the factual predicate of the claim or  
3 claims presented could have been discovered through the exercise  
4 of due diligence.

4 28 U.S.C. § 2244(d)(1)(A)-(D) (West 2006).

5 The statute of limitations does not run while a properly filed state habeas corpus petition  
6 is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999).  
7 *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
8 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
9 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
10 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
11 pending. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001).

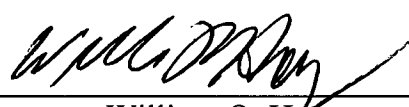
12 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
13 habeas petition “[i]f it plainly appears from the face of the petition and any exhibits annexed to  
14 it that the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll.  
15 § 2254. Here, it appears plain from the Petition that Petitioner is not presently entitled to federal  
16 habeas relief because he has not alleged exhaustion of state court remedies.

### 17 CONCLUSION

18 Based on the foregoing, the Court **DISMISSES** this case without prejudice for failure to  
19 satisfy the filing fee requirement, failure to state a cognizable claim on habeas corpus and failure  
20 to allege exhaustion of state judicial remedies. **IT IS HEREBY ADJUDGED THAT**  
21 **JUDGMENT BE ENTERED DISMISSING THE PETITION AND THE ACTION.**

22 **IT IS SO ORDERED.**

23 DATED: 7/29/11

  
24 William Q. Hayes  
25 United States District Judge  
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